

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: David W. Koenig, et al. Art Unit: 3761
Serial No.: 10/608,661
Filed: June 27, 2003
Confirmation No.: 7070
For: WIPE COMPRISING A PATHOGEN SELECTIVE ANTIMICROBIAL
Examiner: Melanie Jo Hand

October 5, 2007

REPLY BRIEF

This is a reply to the Examiner's Answer mailed August 15, 2007.

Applicants' Comments on the Examiner's Response to Argument

In response to Applicants' arguments that it would not be obvious to incorporate the Yucca extract-containing formulations set forth in Tables 6 and 7 of the Howard, et al. reference into a wet wipe, the Examiner states that Howard, et al. teach that the cosmetic products listed therein (e.g., in column 3, lines 4-13)¹ can benefit from incorporation of the "jojoba products of the invention." The Examiner furthermore asserts that the phrase "jojoba products of the invention," as used in Howard, et al., is referring not to the hydrolyzed jojoba proteins described therein, but rather to the formulations set forth in the Examples of Howard, et al., and

¹ Column 3, lines 4-13 of Howard, et al. states:

Among the cosmetic products which can benefit from incorporation of the jojoba products of the invention are those selected from the group consisting of shampoos, shampoo conditioners, hair styling gels, hair conditioners, hair reparatives, hair tonics, hair fixatives, hair mousses, bath and shower gels, liquid soaps, moisturizing sprays, makeup, pressed powder formulations, lip products, bath additives, sanitizing wipes, hand sanitizers, premoistened towelettes, skin lotions and creams, shaving creams, and sunscreens.

that it therefore would be obvious to incorporate the hand lotion and moisturizing hand creams set forth in Tables 6 and 7 of Howard, et al. into a sanitizing hand wipe, such as set forth on column 3, line 11.

With all due respect, it appears that the Examiner has once again mischaracterized the teachings of the Howard, et al. reference. More particularly, the Examiner appears to be confused as to the meaning of the phrase "the jojoba products of the invention" and the teachings of column 3, lines 4-13 of Howard, et al.

Specifically, Howard, et al. state: "Among the cosmetic products which can benefit from incorporation of the jojoba products of the invention are those selected from the group consisting of shampoos, shampoo conditioners..."² It is clear from this phrase that the "cosmetic products" include shampoo and shampoo conditioners, as well as the other products listed at column 3, lines 4-13 of Howard, et al. (e.g., skin lotions and creams, sanitizing wipes, etc.), several of which are also set forth in the Examples of Howard, et al.,³ while "the jojoba products of the invention" are different entirely from the listed "cosmetic products." Specifically, "the jojoba products of the invention" are products that are incorporated into the

² Howard, et al. at col. 3, lines 4-7 (emphasis added).

³ The Examiner has also queried what else the phrase "jojoba products of the invention" would be referring to, other than the formulations set forth in the Examples of Howard, et al. Applicants submit that it is clear from Howard, et al. that the formulations set forth in the examples (which include moisturizing body wash, shampoo, hand lotion, hand cream, foot cream, foundation, conditioning agents, etc.) are cosmetic products having incorporated therein "the jojoba products of the invention." See, e.g., Howard, et al. at col. 6, lines 42-44 (emphasis added) ("The following products were produced using the hydrolyzed jojoba protein products 39 and 44 described in Example 1."). They are not illustrations of liquid formulations that may be incorporated into sanitizing wipes, as asserted by the Examiner.

various cosmetic products listed at column 3, lines 4-13 and in the Examples of Howard, et al.

As explained in the Appeal Brief, the phrase "jojoba products of the invention" clearly refers to the hydrolyzed jojoba protein and derivatives thereof produced in accordance with the methods of Howard, et al., not to the cosmetic products listed in column 3, lines 4-13 or to the formulations set forth in the Examples. In support of this, applicants cite to columns 1-2 of Howard, et al., which clearly refer to the hydrolyzed jojoba protein and derivatives thereof as being "jojoba products of the invention" that can be incorporated into various cosmetic formulations.⁴

Thus, correctly interpreted, column 3, lines 4-5 of Howard, et al. teaches that jojoba products (i.e., hydrolyzed jojoba proteins and derivatives thereof) can be incorporated into cosmetic products (e.g., skin lotions and creams, sanitizing wipes, etc.). Contrary to the Examiner's assertion, this passage says nothing about incorporating cosmetic products (such as hand lotions or hand creams) into other cosmetic products (such as sanitizing wipes).

The Examiner has also stated that the fact that Howard, et al. list Yucca extract in a table for a hand lotion composition is further evidence that this composition can be applied to a wet wipe substrate with a reasonable expectation of success (see Examiner's Answer, page 8). With all due respect,

⁴ See, e.g., col. 1, line 66 to col. 2, line 2 (emphasis added) ("The present invention is directed to a new form of jojoba protein, namely hydrolyzed jojoba protein and derivatives thereof, as well as uses of such protein products in cosmetic formulations."); col. 2, lines 52-53 (emphasis added) ("The jojoba products of the invention can be used to good effect in a variety of cosmetic formulations"); col. 2, lines 64-67 (emphasis added) ("Inasmuch as the preferred jojoba protein products are in the form of liquid dispersions, it is a simple matter to add the jojoba to the cosmetic formulations during preparation thereof").

applicants do not understand the logic behind this assertion. As noted elsewhere herein and in the Appeal Brief, there is simply nothing in Howard, et al. to suggest incorporating a cosmetic product, such as the hand lotion or hand cream set forth in Tables 6 and 7, respectively, into another cosmetic product, such as a sanitizing wipe. Nor is there anything in Howard, et al. that would lead one skilled in the art to believe that incorporating a Yucca extract into a formulation would make the formulation suitable for application to a wet wipe substrate. As discussed in the Appeal Brief, Howard, et al. do not recognize any antimicrobial or sanitizing effect for Yucca extract or green tea extract, but rather list an entirely different function for these components in Tables 6 and 7; i.e., Yucca extract is described as a stimulant, while green tea extract is described as an astringent.⁵ Why is inclusion of a stimulant (or an astringent) in a hand lotion or hand cream formulation evidence that the hand lotion or hand cream formulation can be applied to a wet wipe substrate? The Examiner's assertion appears to be illogical and completely unsupported.

The Examiner has furthermore stated that all of the formulation components listed in Tables 6 and 7 of Howard, et al. are in liquid form. In particular, the Examiner has asserted that the process of preparing the Yucca extract-

⁵ The Examiner has stated that the recitation in Howard, et al. that Yucca extract is a stimulant and green tea extract is an astringent is immaterial, since these designations are merely an intended use. In response, applicants note that Howard's characterization of the function of Yucca extract and green tea extract in the hand lotion and hand cream formulations is relevant. In particular, because Howard, et al. fail to recognize any antimicrobial effects of Yucca extract and green tea extract, there is no apparent reason for one skilled in the art to incorporate the combination of Yucca extract and green tea extract into a sanitizing wipe, over any of the other numerous formulation components set forth in the examples of Howard, et al.

containing hand lotion and hand cream of Howard, et al. involves heating the formulation components to 75°C, and that it can easily be understood by one skilled in the art that heating the formulation components to this temperature will melt them (i.e., will make them a liquid formulation).

The Examiner appears to be implying that any formulation that contains liquid components or components that will become liquid when heated is a "liquid formulation" within the context of the present claims. Applicants respectfully disagree with this position.

Whether a formulation or formulation components will become liquid upon heating is irrelevant to determining whether it would be obvious to incorporate the formulation into a wipe substrate to form a wet wipe. As will be apparent to those skilled in the art most, if not all, cosmetic formulations such as those described in the Examples of Howard, et al. may melt and become "liquid" if heated to a sufficient temperature. However, these formulations, and in particular, the formulations set forth in Tables 6 and 7 of Howard, et al., are clearly not intended to be used at such an elevated temperature. Furthermore, hand lotions and hand creams commonly comprise liquid components. The presence of liquid components in such formulations does not, however, mean that a hand cream or hand lotion formulation is a "liquid formulation" that can be used in combination with a wipe substrate to form a wet wipe. What is important is that there is no apparent reason for one skilled in the art to incorporate the hand lotion or hand cream formulations set forth in Tables 6 and 7 of Howard, et al. into the sanitizing wipe mentioned on column 3, line 11 of Howard, et al.

More particularly, applicants submit that the common sense of one ordinarily skilled in the art would not have provided a reason to modify the Howard, et al. reference to arrive at Applicants' wet wipes. Specifically, as recognized by the Supreme Court in KSR International Co. v. Teleflex, Inc., while an obviousness determination is not a rigid formula, the TSM (teaching, suggestion, motivation) test captures a helpful insight: A patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the art. Although common sense directs caution as to a patent application claiming as innovation the combination of two known [elements] according to their established functions, "it can be important to identify a reason that would have prompted a person of ordinary skill in the art to combine the elements as the new invention does."⁶ In the instant case, there is simply no apparent reason for one skilled in the art to incorporate the hand lotion or moisturizing hand cream set forth in Tables 6 and 7 of Howard, et al. into a wipe. As such, Applicants' pending claims are patentable over the cited references.

With regard to claims 2, 11, 20, and 24, the Examiner has further stated that applicants' arguments are not persuasive, as they depend entirely on the arguments relating to the rejection of independent claims 1 and 19. Applicants respectfully disagree, and submit that claims 2, 11, 20, and 24 are patentable for similar reasons to those set forth for claims 1 and 19, as well as for the additional reasons set forth in the Appeal Brief.

⁶ KSR Int'l Co. v. Teleflex, Inc., et al. 550 US ___, 2007 WL 1237837 at 5 (2007).

Conclusion

In addition to the reasons set forth in Applicants' Appeal Brief, the rejections of the claims on appeal are in error for the reasons set forth above. Therefore, Applicants request that the Examiner's rejections of claims 1-30 be reversed. Applicants do not believe that any fee is due in connection with this reply. However, the Commissioner is hereby authorized to charge any deficiency or overpayment of any fees to Deposit Account No. 01-2384.

Respectfully submitted,

/Christopher M. Goff/

Christopher M. Goff, Reg. No. 41,785
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
St. Louis, Missouri 63102
(314) 621-5070

CMG/LJH
By EFS